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FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 64

[CG Docket Nos. 03-123, 13-24, 10-51; FCC 20-132; FRS 17133]

Internet Protocol Captioned Telephone Service Compensation

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this document, the Federal Communications Commission (FCC or Commission) adopts a compensation methodology and determines a per-minute compensation rate for providers of Internet Protocol Captioned Telephone Service (IP CTS) supported by the Telecommunications Relay Services (TRS) Fund.

DATES: *Effective Date:* This compensation methodology and per-minute rate of compensation applicable to IP CTS providers is effective December 1, 2020.

FOR FURTHER INFORMATION CONTACT: Michael Scott, Consumer and Governmental Affairs Bureau, at (202) 418-1264, or e-mail Michael.Scott@fcc.gov.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Report and Order and Order on Reconsideration, document FCC 20-132, adopted on September 30, 2020, released on October 2, 2020, in CG Docket Nos. 13-24 and 03-123. The Commission previously sought comment on the issue addressed in the Report and Order in a Further Notice of Proposed Rulemaking (*2018 Further Notice*), published at 83 FR 33899, July 18, 2018. The full text of this document will be available for public inspection and copying at <https://docs.fcc.gov/public/attachments/FCC-20-132A1.pdf> and via the Commission's Electronic Comment Filing System (ECFS). To request materials in accessible formats for people with

disabilities (Braille, large print, electronic files, audio format), send an email to fcc504@fcc.gov, or call the Consumer and Governmental Affairs Bureau at (202) 418-0530.

Congressional Review Act

The Commission sent a copy of document FCC 20-132 to Congress and the Government Accountability Office pursuant to the Congressional Review Act, 5 U.S.C. 801(a)(1)(A).

Final Paperwork Reduction Act of 1995 Analysis

Document FCC 20-132 does not contain proposed information collection requirements subject to the Paperwork Reduction Act of 1995, Public Law 104-13. In addition, therefore, it does not contain any proposed information collection burden for small business concerns with fewer than 25 employees, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. 3506(c)(4).

SYNOPSIS

1. Under section 225 of the Communications Act of 1934, as amended, 47 U.S.C. 225, the Commission must ensure that telecommunications relay services (TRS) are “functionally equivalent” to voice service and are made available to eligible users to the extent possible and in the most efficient manner. One form of TRS, Internet Protocol Captioned Telephone Service (IP CTS), delivers captions for ongoing telephone conversations to individuals with hearing loss, so that they can use the captions and their residual hearing to understand what the other party is saying. Like other forms of TRS, IP CTS is paid for by telecommunications and voice over Internet Protocol (VoIP) service providers’ contributions to the Commission-administered TRS Fund.

2. In its June 2018 Report and Order (*2018 Order*), document 18-79, 83 FR 30082, June 27, 2018, the Commission determined that TRS Fund payments to the companies providing

IP CTS were greatly in excess of actual costs and that the gap between TRS Fund payments and provider costs was becoming wider. The Commission terminated use of the Multistate Average Rate Structure (MARS) methodology, which set the TRS Fund IP CTS per minute compensation rate based on non-Internet captioned telephone service provided through state TRS programs. The Commission also set interim compensation rates for IP CTS providers for the 2018-19 and 2019-20 TRS Fund Years, pending adoption of a replacement compensation methodology. In the *2018 Further Notice*, the Commission sought comment on establishing a new TRS Fund compensation methodology for IP CTS and setting provider compensation for the period after June 30, 2020. On May 29, 2020, after the onset of the COVID-19 pandemic, the Consumer and Governmental Affairs Bureau (Bureau) granted a *sua sponte* waiver of the June 30, 2020, expiration of the 2019-20 TRS Fund Year \$1.58 per minute rate, extending its application through September 30, 2020.

3. In document FCC 20-132, the Commission sets IP CTS compensation through June 30, 2022, completing the adjustment of IP CTS compensation to the level of current reasonable costs. Continuing the approximately 10% annual rate reductions initiated in 2018, the Commission reduces the rate from \$1.58 to \$1.42 per minute for the remainder of the 2020-21 Fund Year and reaches the average cost plus operating margin, \$1.30 per minute, in the 2021-22 Fund Year.

4. The Commission applies these compensation rates on a technologically neutral basis to all forms of IP CTS and all IP CTS providers. The Commission concludes that a tiered rate structure is unsuited to the current IP CTS environment, and the Commission defers consideration of whether and how to set a separate compensation rate for fully automatic IP CTS. The Commission also defers consideration of alternatives to cost-based compensation rates, such

as a reverse-auction approach, until it becomes clearer how the introduction of fully automatic captioning methods will affect provider cost structures. For similar reasons, the Commission defers consideration of whether to apply price-cap-like adjustments to the compensation rate (other than for reimbursement of exogenous costs).

5. *Average Cost Methodology.* The Commission has broad discretion in choosing compensation methodologies and setting compensation rates within the parameters established by section 225 of the Communications Act. To determine a cost-based level of IP CTS compensation for the next rate period, the Commission employs the same methodology used in 2018 to set interim IP CTS rates—setting a rate based on the weighted average of all providers’ projected and historical costs, as reported for the current and immediately preceding calendar years, respectively. Continued use of this cost-based methodology in the near term will advance the efficiency mandate of section 225 and permit service quality improvements in functionally equivalent service to users without unduly burdening providers.

6. *First*, through more than 25 years of experience using an average-cost methodology to set TRS compensation, the Commission has developed a consistent approach to determining the reasonable costs for TRS, which can be applied without imposing undue administrative burdens on either providers or the Commission. Although any ratemaking method is subject to imprecision, provider cost data, which is subject to audit, has been reasonably reliable and consistent. Further, at this time the record does not indicate a reliable alternative that the Commission is confident would produce more accurate results. And, as discussed in more detail below, the Commission’s determinations regarding allowability of costs are solidly reasoned and have been upheld on judicial review.

7. *Second*, average-cost-based compensation, especially when applied for more than

one year, provides substantial incentives and opportunities for individual TRS providers to increase their efficiency and capture the resulting profits. Such incentives and opportunities are especially strong in the current circumstances. According to the TRS Fund administrator's analysis of average costs over the last six years, IP CTS costs have continuously declined—as one would expect in an industry characterized by significant technological innovation, steady accumulation of management experience and expertise, and progress in realizing economies of scale. And the declining cost trend is likely to continue or accelerate with the introduction of fully automatic IP CTS as an option for consumers.

8. *Third*, maintaining the same compensation methodology employed two years ago provides a measure of transitional stability at a time of technological change. The Commission does not yet have sufficient experience with fully automatic IP CTS to be able to take account of this potentially game-changing technology in the design of a new compensation methodology. Further, given the likelihood that established approaches to the provision of IP CTS may be replaced over time with less costly technology, it is possible that some providers, facing uncertainty about the scale and stability of future demand for their services, could exit before comparable services that maximize the advantages of newer technology are readily available to all segments of the telephone captioning market. By providing a relatively predictable path, the Commission can enable legacy services to remain available until the advantages of the newer technology are more fully realized.

9. With the introduction of fully automatic IP CTS using advanced automatic speech recognition (ASR), IP CTS cost structures may change substantially by the end of the next rate period. As more providers begin to offer this alternative, and data becomes available on the actual costs of providing fully automatic IP CTS, the Commission will be able to make future

compensation decisions that address the impact of this new technology, including the selection of a new methodology if such is warranted.

10. *Allowable cost categories.* The Commission applies to IP CTS, with only one exception, the same allowable-cost rules used to determine TRS Fund support of other forms of Internet-based TRS. For well over a decade, the Commission has consistently defined allowable TRS costs as a provider's reasonable costs directly attributable to the provision of TRS. In document FCC 20-132, the Commission adheres to well-settled rulings on the allowability of specific categories of TRS costs, including, e.g., disallowance of costs attributable to allocated overhead and the provision and maintenance of end-user devices. The record provides no support for treating IP CTS differently from other forms of TRS with respect to these cost categories.

11. *Marketing Expenses.* Although the use of TRS Fund resources to support marketing of IP CTS may raise legitimate concerns, at this time the Commission will continue to allow recovery of IP CTS marketing expenses (which are also recoverable for other forms of TRS). The nature and extent of the marketing conducted by IP CTS providers, as well as the associated costs, may change significantly as more providers offer fully automatic IP CTS. The Commission directs the Bureau, in consultation with the Office of Managing Director (OMD), to prepare and submit a request to the Fund administrator to conduct an analysis and report to Bureau on the trend of TRS Fund expenditures in support of IP CTS marketing, the specific activities for which they are used, and the impact of such activities on registration for and usage of IP CTS, to enable the Commission to revisit the allowability of such costs, if appropriate, at a later time.

12. *Outreach Expenses.* Similarly, as responsible stewardship requires continued

monitoring of TRS Fund expenditures for provider-led outreach, the Commission directs the Bureau, in consultation with OMD, to prepare and submit a request to the Fund administrator to analyze and report to the Bureau on the trend, activities, and impact of provider-led IP CTS outreach. However, the Commission does not prohibit or cap TRS Fund recovery of IP CTS outreach costs at this time. Provider outreach for IP CTS likely serves a reasonable purpose, by educating potential IP CTS users and their families about the nature of the service. Further, this differs from general outreach intended to raise public awareness about how TRS works and why members of the public should accept TRS calls, which the Commission in 2013 found was better conducted by a national TRS Fund contractor than by individual providers (and for which video relay service (VRS) and Internet Protocol Relay Service (IP Relay) providers are no longer compensated by the TRS Fund). The Commission recognizes that such outreach to potential users is not always easy to distinguish from branded marketing and, as a result, may raise some of the same issues as marketing costs, regarding the appropriateness of supporting such activities with TRS Fund resources. Accordingly, as noted above, the Commission will continue to monitor the trend of IP CTS outreach as well as marketing costs, to enable the Commission to revisit their allowability, if appropriate, at a later time.

13. *Subcontractor Expenses.* The Commission defers action on the alternatives proposed in the *2018 Further Notice* for enabling the Commission to ascertain the reasonableness of providers' payments to subcontractors. The Commission sought comment on whether to require a subcontractor whose fees exceed a certain percentage of a provider's expenses to file its own cost report breaking down the fees into appropriate cost categories, and alternatively whether to require any subcontractor offering what amounts to a "turnkey" relay service to apply for certification as an IP CTS provider on its own account. At this time, the

record is limited on these issues and thus insufficient to support adopting either of these remedies. The Commission notes, however, that the amended rule requiring IP CTS providers to report and, if necessary, break down their contract payments under the TRS Fund administrator's substantive cost categories—i.e., *not* as undifferentiated “subcontractor payments” reported as part of the “Other” category—became effective February 4, 2019. The Commission reminds providers of their obligations under this amended rule.

14. *R&D Costs and Licensing Fees.* To the extent that a TRS provider incurs costs to develop or acquire intellectual property that is needed to provide TRS in accordance with the Commission's minimum standards, the Commission has long permitted the inclusion of such expenses in the costs subject to TRS Fund recovery. Thus, a provider's reasonable research and development (R&D) costs may be recovered from the TRS Fund, but only to the extent of the actual expenses incurred, and only if such expenditures are necessary to develop technology that enables the provider to offer service meeting the Commission's minimum TRS standards. Subject to the same limitations, reasonable licensing fees paid to a supplier of externally developed technology are allowable. The Commission recognizes that potentially excessive costs could be imposed on TRS Fund contributors if a single company possessed a monopoly of essential intellectual property rights and was also permitted to “hold all others hostage to its fee demands.” However, neither of these conditions appears to be present at this time. Further, the current record does not provide a basis for the Commission to find that any of the amounts currently paid by TRS providers to an unaffiliated entity for technology licensing are in excess of a reasonable amount. However, the Commission will continue to monitor such expenses and may revisit the question of intellectual property payments to unaffiliated entities at a later time.

15. The Commission is unpersuaded by CaptionCall's elaboration of its 2018

argument that license fees representing the imputed *value* of the intellectual property developed by CaptionCall should be recoverable from the TRS Fund. The Commission’s cost-of-service methodologies, whether applied to TRS or to tariffed common carrier services, have been designed to allow service providers to recover reasonable *costs* incurred to provide service, but a TRS provider is not entitled to treat as a *cost* the imputed *value* of technology it develops. Such value-based recovery is inconsistent with the entire history of cost-of-service regulation as conducted by the Commission, and the Commission finds no reason to depart from precedent in order to permit such value-based recovery in this case. The value of such investments may be recovered as profit, to the extent permitted by the allowed operating margin, but treating such value as a cost is simply inconsistent with cost-based compensation.

16. Similarly straightforward application of longstanding Commission rules to the record in this proceeding precludes TRS Fund recovery of the “license fees” that CaptionCall allegedly has paid to an affiliate, Sorenson IP Holdings, LLC, for technology now owned by the affiliate. Of fundamental importance is the fact that, according to CaptionCall, the technology at issue was developed *by CaptionCall itself* over a period of years, and ownership of the technology was transferred to the affiliate in 2017 for reasons of “security, monetization, efficiency, and tax.” Because the “license fee” represented as paid to this affiliate is in essence a payment by CaptionCall *for the use of its own technology*—rather than for use of technology developed by the affiliate or anyone else—the Commission must conclude that the transaction created by CaptionCall’s accountants is not a genuine transfer of anything of value. Accordingly, such a “license fee payment,” regardless of the amount, cannot be allowed as a compensable cost. Further, even if the Commission was to consider the “license fee” as part of a genuine transaction between affiliates, application of the Commission’s affiliate transaction rule

would not result in any allowable “license fee” in these circumstances. Under the affiliate transaction rule, adopted to prevent inappropriate accounting practices and limit the potential for self-dealing by carriers under rate regulation, a payment by CaptionCall to its affiliate for licensing CaptionCall’s technology back to itself must be booked at the lower of fair market value and the affiliate’s net book cost, unless the affiliate sells at least 25% of the asset to third parties. To determine the affiliate’s net book cost, the Commission would need to know the amount, if any, that the affiliate originally paid CaptionCall for transferring ownership of CaptionCall’s technology to the affiliate. CaptionCall seems to acknowledge, however, that no such payment was made, or even booked for accounting reasons.

17. The Commission’s application of longstanding cost-recovery rules and policies treats similarly situated providers alike, and avoids creating artificial incentives for the purchase of technology from external sources over the internal development of technology. Subject to the overall limitation that technology must be directed at the provision of service that meets minimum TRS standards, providers that purchase technology externally are entitled to recover their reasonable costs of purchasing such technology, and providers that develop TRS technology internally are entitled to recover their reasonable R&D costs incurred in developing such technology. Allowing additional, value-based recovery by a provider choosing internal development would result in double recovery of the same investment. Moreover, while encouraging the development of IP CTS technology by multiple sources may well advance the goals of section 225, the compensation methodology the Commission adopts does exactly that. A provider that can reduce its costs by developing technology internally (or by purchasing technology externally, if that turns out to be a more efficient choice) is not penalized but rewarded, by incurring lower costs while collecting compensation at the same rate as its rivals.

18. *Operating Margin.* Because IP CTS remains at present a labor-intensive industry in which communications assistants (CAs) play a major role, the Commission adopts its proposal that the compensation rate for IP CTS, like the rates for VRS and IP Relay, include an allowed operating margin, in lieu of the return on plant investment previously allowed. By allowing providers a reasonable margin over expenses, which is not tied to the relatively low capital investment in physical plant that is needed for the provision of IP CTS, this will help ensure sufficient investment in the provision of this service. The Commission finds it reasonable to set a percentage operating margin within the same “zone of reasonableness” that applies to VRS providers. In the *2017 VRS Compensation Order*, after reviewing operating margins for companies in various analogous service sectors, the Commission found a zone of reasonableness for VRS between 7.6% and 12.35%. Given the similarities between VRS and IP CTS, including that the bulk of costs for both are attributable to labor rather than capital, the Commission concludes that this zone of reasonableness is also appropriate at this time for setting IP CTS rates.

19. For purposes of establishing a cost-based IP CTS rate for the next rate period, the Commission sets the operating margin at 10%—the approximate midpoint of the zone of reasonableness. The Commission concludes that assigning an operating margin at the midpoint of the zone is warranted and is ample to ensure providers a reasonable profit, for three reasons. First, there are material differences between IP CTS and IP Relay—to which the Bureau assigned an allowed operating margin at the high end of the same zone of reasonableness. Unlike IP Relay, which has not recently experienced significant growth, IP CTS demand has grown at a substantial rate for many years, suggesting that the risks associated with investing in this service may be lower overall than for IP Relay. Second, in extending the “glide path” for

bringing IP CTS compensation to the level of costs, the Commission is necessarily extending the opportunity, which has been available to providers for several years, to collect profits in excess of whatever margin is allowed. Third, the introduction of fully automatic IP CTS with advanced ASR technology, either as a complete substitute or a complement for CA-assisted IP CTS, is providing an unusually large opportunity for providers to reduce their costs and thereby increase further their opportunities for profit at relatively lower risk. These considerations could justify setting an operating margin for IP CTS in the lower portion of the zone of reasonableness. At this time, however, the Commission conservatively concludes that an operating margin of 10%, in the middle of the zone of reasonableness, is appropriate for IP CTS, while recognizing that the Commission may choose to revisit the issue of operating margin at the end of the two-year rate period that the Commission adopts in this Report and Order.

20. *Averaging of Historical and Projected Costs.* The Commission continues the practice of averaging historical and projected costs to arrive at a cost-based rate. Although projected costs can more accurately reflect current conditions, provider cost projections often have proved unreliable, and the current record provides no evidence to indicate that exclusive reliance on such projections would produce better results in the future. Further, in the current circumstances, with continuously declining IP CTS costs, setting compensation rates based on the average of the costs incurred in the previous year and those projected for the current year allows even providers who have higher than average costs a reasonable opportunity to recover their current allowable expenses plus an operating margin.

21. *Calculation of a Cost-Based Rate.* Based on the above determinations, calculation of a cost-based rate is straightforward. The weighted average of provider per-minute expenses for 2019 (historical) is \$1.1350, and for 2020 (projected) is \$1.2375. Adding a 10%

operating margin to each of these numbers produces a per-minute cost-plus-operating-margin of \$1.2485 for 2019 and \$1.3612 for 2020. The average of these two numbers is \$1.3048, which the Commission rounds down to \$1.30.

22. *COVID-19 Costs.* After the outbreak of the coronavirus (COVID-19) pandemic, IP CTS providers experienced an unanticipated increase in IP CTS traffic levels and incurred additional costs in order to enable numerous communications assistants to work at home rather than at call centers. To provide an opportunity to determine the impact of these developments on per-minute provider costs before the Commission set a new IP CTS compensation rate, the Bureau extended the expiration date of the current compensation rate and directed the TRS Fund administrator to request additional cost and demand data for January to June 2020 from CA-assisted IP CTS providers and file an update to the IP CTS data contained in the 2020 TRS Rate Report. Based on the information submitted by the four active providers who provided the additional data requested for all periods, the TRS Fund administrator reports that increased expenditures during the pandemic have been offset by increased call volumes, resulting in no net increase in per-minute costs for the reporting providers, as a group or even individually. Therefore, the Commission concludes that no adjustment is warranted to the weighted average cost data on which the Commission relies to set compensation rates for the next two years. For the same reasons, the Commission declines to freeze the current rate for an additional period, beyond November 30, 2020. In the absence of *any* concrete evidence of a net cost increase, the Commission declines to defer long-needed rate corrections based on abstract concerns about the unpredictable nature of the pandemic.

23. *Compensation period.* The Commission adopts a two-year compensation cycle for IP CTS (which includes the five-month extension of the current \$1.58 rate past its original

expiration date). The Commission's balancing of the factors relevant to the duration of the compensation period is different than in 2017, when the Commission set a four-year rate period for VRS. In this instance, the Commission concludes that, due to the introduction of ASR-based technology, industry cost structures are likely to change substantially in the near term, necessitating that the Commission revisit the IP CTS compensation rate at an earlier stage in order to avoid recreating another major gap between TRS Fund expenditures and actual IP CTS costs. Accordingly, the Commission limits the rate period to two years. As the Commission found in setting interim IP CTS compensation rates for the previous two years, setting compensation for a two-year period provides some measure of rate certainty for providers and mitigates the risk of rewarding inefficiency, discouraging innovation, and incentivizing providers to incur unnecessary costs, all of which would be proportionally greater were the Commission to engage in annual cost-of-service rate setting.

24. *Glide Path.* Under the MARS methodology, the IP CTS compensation rate had reached a level that exceeded average per-minute provider expenses by some \$0.72, or almost 60%. To decrease this gap, and the resulting waste of the TRS Fund, while providing an opportunity for less efficient providers to improve their efficiency and continue serving their customers, the Commission reduced the compensation rate by 10% in two successive years, bringing it to the current level of \$1.58 per minute. However, this rate is still \$.28 higher than current average cost of \$1.30 per minute.

25. Therefore, the Commission will extend for somewhat less than a year the "glide path" initiated by the 2018 order, reducing the compensation rate by 10% in the current year and deferring to 2021-22 the further reduction necessary to reach the average-cost-based \$1.30 rate. A modest extension of the "glide path" will afford higher-cost providers an additional

opportunity to adopt more efficient technologies and business methods before their compensation is reduced all the way to the average-cost level. The Commission recognizes that extending the glide path in this manner allows IP CTS providers as a group to continue earning operating margins in excess of the zone of reasonableness for the remainder of the current Fund Year. However, the alternative—a flash-cut \$0.28 reduction of the rate—could place significant immediate financial pressure on those providers whose operating costs are higher than average, possibly causing them to exit the IP CTS market, with the potential for at least temporary disruption of service to customers. While the Commission does not seek to encourage inefficient competitors to remain in the market, in a period of rapidly declining costs, the Commission also seeks to permit experienced providers of this service a fair opportunity to adjust their operations so as to successfully provide this service in the most efficient manner. In addition, allowing higher-cost providers an additional period to adjust to reduced compensation will help ensure that IP CTS users continue to have a choice among multiple competitors—and such quality-of-service competition in turn helps maintain all providers’ incentives to continue offering functionally equivalent service. Given that there is no single correct answer in designing a glide path, and that the exercise of administrative judgment is required, the Commission concludes that continuing the 10% reductions strikes a reasonable balance between the need to eliminate waste and ensure the efficient expenditure of TRS funds, on the one hand, and the benefits of continuity of service and competition, on the other. Accordingly, the Commission sets the compensation rate for the remainder of the 2020-21 Fund Year at \$1.42, approximately 10% lower than \$1.58.

26. The Commission declines to subject providers to a “true-up,” i.e., the Commission declines to decrease further the compensation rate for the remainder of year in order

to offset the five-month deferral of the new rate and ensure that their overall compensation for the Fund Year averages \$1.42. Instead, to avoid the administrative burdens and potential disruption associated with a true-up, the Commission allows providers to retain the benefit of the five-month extension of the \$1.58, thereby mitigating further any potential adverse impact from the Commission's necessary progression to a more efficient, cost-based compensation rate.

27. In summary, to complete the glide path to the current cost-based rate, beginning with minutes of service provided on or after December 1, 2020, the current \$1.58 rate will be reduced by approximately 10%, to \$1.42, and effective July 1, 2021, that rate will be reduced to \$1.30.

28. *Price cap approach.* The Commission concludes that it would not be beneficial to make price-cap-like adjustments to the above rates based on inflation and productivity factors. While the Commission is confident that there will be major productivity improvements in IP CTS over the next two years, causing actual IP CTS costs to continue to decline as they have for the last seven years (even without adjusting for inflation)—and which would thereby lead to downward price-cap adjustments were the Commission to require such adjustments—a formal price-cap-like approach would be premature until the Commission is better able to assess the impact of ASR technology on IP CTS costs. Accordingly, the Commission defers consideration of the appropriateness of a price-cap methodology for IP CTS.

29. *Exogenous costs.* During this rate period, the Commission adopts the same exogenous-cost policy that is already in place for VRS. IP CTS providers may seek compensation for well-documented exogenous costs that (1) belong to a category of costs that the Commission has deemed allowable, (2) result from new TRS requirements or other causes beyond the provider's control, (3) are new costs that were not factored into the applicable

compensation rates, and (4) if unrecovered, would cause a provider's individual allowable-expenses-plus-operating-margin for the current year to exceed its IP CTS revenues. Allowing recovery of exogenous costs subject to these conditions will ensure that providers are able to receive compensation for unforeseeable cost increases, without increasing the disparity between Fund expenditures and individual provider costs.

30. *Effective Date.* The Commission finds good cause to set December 1, 2020, as the effective date for the \$1.42 per-minute compensation rate. The current rate was originally scheduled to expire June 30, 2020. Providers have been aware of this pending expiration and Commission proposals to adopt a new compensation methodology since 2018. In partial response to provider requests, to avoid unnecessary disruption to IP CTS providers' operations, and to ensure the ability of consumers to continue to place and receive IP CTS calls pending an assessment of the impact of the COVID-19 pandemic on provider costs, the Bureau waived the June 30, 2020 expiration of the existing compensation rate and directed Rolka Loube to continue compensating IP CTS providers at that rate until September 30, 2020. Relatively quick implementation of the new compensation rate is necessary to expeditiously promote the goals of the statute as laid out in the order, including ensuring the availability of IP CTS in the most efficient manner without imposing burdensome costs on TRS Fund contributors. To ensure that there is no lapse in payment of compensation to providers, the Commission extends the Bureau's waiver of the June 30, 2020 expiration of the existing compensation rate and direct Rolka Loube to continue compensating IP CTS providers at the current \$1.58 rate for two additional months, through November 30, 2020. The Commission also directs the Bureau to provide actual notice to known IP CTS providers by sending them a copy of this Order, which may be accomplished electronically.

31. *ASR-only IP CTS compensation.* During this two-year compensation period, the Commission adopts a single compensation rate applicable to all forms of IP CTS, including fully automatic IP CTS. Although the *2018 Further Notice* requested comment on whether and how to establish a separate compensation rate, at this time the Commission does not have sufficient experience with fully automatic IP CTS to accurately estimate the relevant costs. Without sufficient cost information, setting a new separate rate for ASR-only would be arbitrary and inconsistent with the Commission's current, technology-neutral approach of granting all providers the same compensation rate derived from average weighted costs. Moreover, setting a lower compensation rate for fully automatic IP CTS in the absence of sufficient cost information regarding this form of the service would run the risk of creating a disincentive for providers to adopt this highly promising technology.

32. Further, based on current information, it may not be necessary or appropriate to have a separate compensation rate for fully automatic IP CTS in order to advance the objectives of section 225. Recent testing of the fully automatic captioning engines proposed by applicants for IP CTS certification indicates that fully automatic IP CTS can deliver captions far more quickly than IP CTS provided with communications assistants, and with comparable or greater accuracy, suggesting that fully automatic IP CTS has become a reasonably close economic substitute for traditional CA-assisted service. By setting a single rate for IP CTS for the next rate period, the Commission recognizes fully automatic IP CTS as providing the same type of TRS as CA-assisted IP CTS and ensures that all providers have sufficient incentive to try out various approaches to integrating fully automatic captioning into their service offerings. Maintaining a single rate is also administratively efficient for compensating providers that offer a hybrid service that sometimes provides fully automatic IP CTS and sometimes employs

communications assistants in the delivery of captions. For example, providers will be able to receive compensation for calls that involve switching between the two captioning methods, pending implementation of more fine-grained reporting of such calls.

33. *Tiered and emergent-provider rate structures.* The Commission declines to adopt a tiered rate or emergent-provider rate structure for IP CTS compensation at this time. In setting TRS Fund compensation, the Commission's traditional approach is to establish a single, generally applicable compensation rate based on average provider costs. This approach greatly simplifies the rate-setting process and creates an incentive for providers to increase their efficiency. In setting compensation for VRS, the Commission has deviated from this principle due to a number of specific circumstances that the Commission found were threatening the viability of competition among VRS providers, including long-term dominance of the VRS market by a single provider, major and growing disparities in [individual] providers' per-minute costs, and a history of chronic interoperability problems and related structural issues, all of which have been found to hinder smaller VRS providers' ability to compete effectively with the largest provider. The Commission is not persuaded that similar or equally compelling factors are present in the IP CTS market to an extent that would justify introducing the complexities and potential inefficiencies of a tiered rate structure or an emergent provider rate. While there may be some economies of scale in IP CTS, the Commission finds little evidence that such economies of scale are preventing the emergence of efficient competitors.

34. *First*, the market share of the largest provider in IP CTS is not comparable to that of the largest provider in the VRS market.

35. *Second*, the record shows relatively low correlation between each IP CTS provider's compensable minutes and per-minute costs, at best suggesting that some providers

have not realized efficiencies in their business models that would enable them to realize inherent economies of scale. Indeed, the record suggests that, unlike in the VRS context, this may be a case where the higher costs for some IP CTS providers are attributable to business decisions concerning use of contractors as turnkey service providers, prior investments in technology and business processes, and differences in business models, rather than issues of scale.

36. *Third*, IP CTS's continuous record of rapid growth suggests that there are substantially greater opportunities than in the VRS context for a provider to reach efficient scale within a relatively short period of time. This is especially the case in light of the new opportunities for small providers and new entrants to use advanced ASR technology to offer fully automatic IP CTS at greatly reduced operating cost.

37. *Fourth*, unlike VRS, IP CTS is not dependent on interoperability and does not have other network effects that make it difficult for new entities to enter or obtain eligible IP CTS users as customers.

38. *Reverse auction*. The Commission defers consideration of whether a reverse auction would be an efficient and effective method of setting IP CTS compensation. The Commission recognizes that a properly structured reverse auction could be an effective mechanism to ensure that compensation reflects market forces. The record to date, however, does not enable us to determine whether an auction mechanism can effectively support the provision of IP CTS by multiple competitors. As the Commission found with VRS, holding an auction to establish a compensation rate for the provision of service by multiple competitors runs the risk of producing a rate well above the average cost of providing service, or so low as to keep currently higher cost providers from continuing or new entrants from joining the market.

39. It may be that a carefully developed reverse auction could resolve some of these concerns or could be modified to do so. However, the development and implementation of a reverse auction would take substantial time, money, and effort, with no assurance that the benefits would exceed the costs. Implementation of such an auction in the current environment also raises questions for which informed answers are not yet available. Specifically, the type of auction proposed by CaptionCall would accommodate only a limited number of post-auction competitors, and thus would require the Commission to weigh carefully the costs and benefits of imposing such limits on IP CTS competition and consumer choice. For example, what is the minimum number of post-auction IP CTS competitors that would be necessary to maintain adequate service quality and innovation incentives consistent with the functional equivalence, efficiency, availability, and other goals of section 225?

40. These challenges are compounded by the recent introduction of fully automated IP CTS, with major consequences for IP CTS cost structure, the details of which are not yet well understood. The Commission believes it would be a waste of Commission resources to undertake a major change in methodology at this time, before the Commission is in a position to assess the impact of those changes. The Commission does not yet have sufficient experience with fully automatic IP CTS to be able to predict accurately the extent to which it will be adopted by consumers in the near term, to assess the likely effect of such adoption on average IP CTS costs, and to design an alternative compensation methodology that can take this potentially game-changing technology into account. The Commission concludes that there is a need for further development of data on the costs and performance of fully automatic IP CTS, before the Commission can make an informed determination whether, how, and when to adopt a reverse auction methodology.

41. *Proposals to maintain a higher rate.* The Commission rejects proposals by some IP CTS providers to set the IP CTS rate at higher levels than the average of providers' allowable costs. CaptionCall's proposed initial rate of \$1.75 is based on an incorrect cost analysis that includes non-allowable licensing costs, as explained above. CaptionCall's alternative argument, that setting a higher rate is necessary to ensure all IP CTS providers are able to stay in the market and continue to make capital investments in innovation and efficiency, is likewise unpersuasive. Especially with the emergence of fully automatic technology as a service option, there are reasonable opportunities for higher-than-average-cost providers to reduce costs by adopting more efficient captioning technologies and business practices without reducing the consumers' opportunities to receive functionally equivalent service. Further, the Commission is charged with ensuring the availability of a high-quality captioning service, not ensuring that all existing providers remain in the market.

42. Hamilton's proposal for an initial rate no lower than \$1.7630 reflects the IP CTS rate for the 2011-12 TRS Fund year (which Hamilton asserts was the last year in which neither the Commission nor any party challenged the MARS rate for IP CTS as unreasonable) and thus disregards the record evidence of current IP CTS costs. Whatever rate may have been reasonable almost a decade ago, Rolka Loube's data analysis shows that average IP CTS provider costs have dropped by some 37% since then. While current provider cost reports may be subject to imprecision, they are certainly more accurate than a 10-year old compensation rate based on a proxy that is no longer applicable.

43. *IP CTS provider cost transparency.* The Commission declines to require public disclosure of IP CTS providers' costs, as requested by Consumer Groups and Academic Researchers. Such a step would require a rule amendment that is beyond the scope of this

proceeding.

Order on Reconsideration

44. The Commission denies Sprint's petition to reconsider the adoption of interim IP CTS rates for Fund years 2018-19 and 2019-20. Sprint's petition relies on arguments that were previously raised with and fully addressed by the Commission, and none of its arguments identifies any material error, omission, or reason warranting reconsideration.

45. First, in contending that the Commission impermissibly adopted interim rates based on a stale record, without seeking additional comment to update the record, Sprint expressly acknowledges that parties raised this concern and that the Commission responded to their arguments. Sprint also fails to show material error, omission, or reason warranting reconsideration. Mere disagreement with the Commission's procedural or substantive decisions is not sufficient, and Sprint does not dispute that the interim rates were set based on current, publicly available cost data, on which the parties had an opportunity to comment. Sprint does not point to any specific flaw, other than its alleged staleness, in the record on which the Commission based its compensation decision. Further, the Commission sought and received numerous additional comments and submissions from interested parties on the compensation issue in the years following the Commission's 2013 Further Notice of Proposed Rulemaking, and relied on up-to-date provider cost data in determining that the MARS methodology was no longer useful and in setting interim cost-based rates.

46. Sprint's second argument, that the interim rates cause unwarranted economic harm to IP CTS providers by failing to reflect the reasonable cost of providing IP CTS, was also previously raised with and addressed by the Commission. Sprint presents no new evidence of economic harm, instead repeating arguments that the Commission considered and rejected in the

2018 Order, regarding the allowability of various cost categories. The Commission discussed in detail the factors bearing on the reasonableness of provider costs, including the allowability of various kinds of expenses and the allowable operating margin. In addition, the Commission set the interim rates substantially *higher* than average cost in order to limit the initial impact of necessary rate reductions on IP CTS providers. While Sprint may believe the Commission should have analyzed the cost data differently than it did, Sprint's contrary opinion is not a material error, omission, or reason for reconsideration.

47. Sprint's third argument, that the Commission should have delayed action on rates pending the outcome of the *2018 Notice of Inquiry* on service quality standards, also fails to identify a material error, omission, or reason warranting reconsideration. Rather, Sprint's argument rests on pure speculation about the possibility that the *2018 Notice of Inquiry* could eventually lead to the imposition of new, more onerous standards that providers would be unable to meet without incurring higher costs. In any event, no new service quality standards became effective—or were even proposed by the Commission—during the period covered by the interim rates.

48. Finally, in arguing that the interim rates will preclude IP CTS providers from offering high-quality service, investing in innovation, or competing effectively, Sprint again fails to explain what aspect of these issues the Commission did not fully consider or to otherwise identify a material error, omission, or reason for reconsideration. The Commission fully considered the potential impact of reducing the compensation rate on service quality, investment in innovation, the ability of providers to obtain funding, and competition, and the Commission implemented steps to mitigate these potential effects. The Commission provided a glide path to reduce the rates over a two-year period and set both interim rates well above the average cost-

based rate, which it calculated with the inclusion of a reasonable operating margin for providing IP CTS. The Commission also took action to allow all providers the opportunity to implement ASR-only IP CTS, a far less costly alternative to CA-assisted IP CTS. Sprint does not present any new arguments that explain why providers would be unable to offer high quality service, invest, or compete while receiving a rate well above the average cost to provide IP CTS. In addition, during the last two years, the potential adverse consequences alleged by Sprint have not come to pass. No provider has left the IP CTS market or indicated it is failing to provide functionally equivalent service; the record does not indicate a general reduction in service quality; current providers continue to invest in new technologies, such as ASR; and the Commission recently certified two new IP CTS providers who use ASR technology, thereby increasing competition and consumer choice.

FINAL REGULATORY FLEXIBILITY ANALYSIS

49. As required by the Regulatory Flexibility Act of 1980, as amended (RFA), the Commission incorporated an Initial Regulatory Flexibility Analysis (IRFA) into the *2018 Further Notice*. The Commission sought written public comment on the proposals in the *2018 Further Notice*, including comment on the IRFA. No comments were received in response to the IRFA.

A. Need For, and Objectives of, the Rules

50. Document FCC 20-132 adopts TRS Fund compensation rates to support the provision of IP CTS for the remainder of Fund Year 2020-21 (December 1, 2020, through June 30, 2021) and for Fund Year 2021-22 (July 1, 2021, through June 30, 2022). These rates are applicable to all forms of IP CTS, including fully automatic IP CTS, and to all providers that are or may become certified by the Commission to offer IP CTS in accordance with its rules. The

compensation rates are set using a cost-of-service methodology based on an average of providers' actual and projected costs and are designed to continue the reduction of the IP CTS compensation rate by approximately 10% each year, so that by the second year, compensation is at the level of average cost (\$1.30 per minute). Thus, the compensation rate for Fund Year 2020-21 is \$1.42 per minute (10% below the current \$1.58 rate) and the compensation rate for Fund Year 2021-22 is \$1.30 per minute (8.5% below the first year \$1.42 rate).

51. This approach is needed to continue the reduction of IP CTS provider compensation along a glide path to where it is more closely aligned with the actual costs of providing this service, as determined based on historical and projected cost data reported to the TRS Fund administrator by IP CTS providers. Maintaining this cost-based approach ensures that providers are compensated for the average reasonable cost of providing service, reduces unnecessary burdens on TRS Fund contributors and indirectly on their subscribers, and increases the assurance that IP CTS is made available in the most efficient manner. To permit a further opportunity for less efficient providers to improve their efficiency and to ensure that functionally equivalent IP CTS remains available to all eligible consumers, the Commission continues for a short period the phased reduction of the compensation rate on a "glide path" by approximately 10% annually, so that compensation is reduced to the level of average cost by the second year.

B. Summary of Significant Issues Raised by Public Comments in Response to the IRFA

52. No comments were filed in response to the IRFA.

C. Response to Comments by the Chief Counsel for Advocacy of the Small Business Administration

53. The Chief Counsel did not file any comments in response to the proposed rules in

this proceeding.

D. Small Entities Impacted

54. The rules adopted in document FCC 20-132 will affect obligations of IP CTS providers. These services can be included within the broad economic category of All Other Telecommunications.

E. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

55. In maintaining cost-based rates, the Commission will continue to require IP CTS providers to file annual cost and demand data reports with the TRS Fund administrator. There is no additional burden on IP CTS providers to file these reports. The Commission does not make any changes to the cost categories reported by providers. The Commission has received approval to require the collection of such information pursuant to the Paperwork Reduction Act of 1995 (PRA).

F. Steps Taken to Minimize Significant Impact on Small Entities, and Significant Alternatives Considered

56. The rates set by the Commission compensate providers for the average reasonable cost of providing service, reduce unnecessary burdens on TRS Fund contributors—and, indirectly, on their subscribers—and ensure that IP CTS is available to all eligible users to the extent possible and in the most efficient manner. Adopting a single, generally applicable compensation rate for each rate period treats all providers equally while minimizing significant impact on small entities. Under this technology-neutral approach, small-business providers of IP CTS are afforded wide flexibility to reduce costs and increase efficiency during the rate period, e.g., by making greater use of ASR technology, while continuing to obtain TRS Fund support at

the same rate. In addition, the phased, “glide path” reduction of compensation to the average cost level provides additional flexibility for small-business providers to make efficiency adjustments over time. The Commission considered various alternative compensation methodologies, including an auction and a tiered structure of varying compensation rates, and finds that, at this time, to reduce the burden on TRS Fund contributors (which affects rates charged to all telephone users) and to fairly compensate the IP CTS providers, a cost-based rate best fulfills the statutory obligation to ensure the availability of functionally equivalent service in the most efficient manner.

57. The Commission sent a copy of document FCC 20-132, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

ORDERING CLAUSES

58. Pursuant to sections 1, 2, and 225 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 152, 225, document FCC 20-132 IS ADOPTED.

59. The application of the pre-existing \$1.58 compensation rate for IP CTS is extended through November 30, 2020.

60. Sprint’s Petition for Reconsideration of the interim rates adopted in the *2018 Order* IS DENIED.

Federal Communications Commission.

Marlene H. Dortch,
Secretary.